Statement of Lawrence M. Mann
before the House Committee on Transportation & Infrastructure Railroads Subcommittee
on "Current Issues in Rail Transportation of Hazardous Materials"
June 13, 2006, 10 a.m.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to submit this testimony regarding the administration of the Federal Railroad Safety Act ("FRSA") and the need to revise the FRSA to ensure that it does not preempt state laws associated with railroad accidents and negligence claims.

By way of introduction, my name is Lawrence Mann and I am a founding partner of the law firm, Alper & Mann. I have devoted my entire professional career to improving railroad transportation safety. For example, I was one of the principal draftsmen of the Federal Railroad Safety Act of 1970, which included amendments to the Hazardous Materials Transportation Act. Since that time I have participated in virtually every major amendment to the federal railroad safety laws. I have appeared before the Federal Railroad Administration in every major proposed rulemaking relating to safety and I have participated in many of the most significant lawsuits nationwide in connection with the interpretation of federal laws and regulations, as well as the rights of the states to adopt and enforce rail safety laws. I am a Board member of the Academy of Rail Labor Attorneys, and an alternate member of the federal Railroad Safety Advisory Committee.

Throughout my career, I have been involved in numerous lawsuits involving both hazardous materials spills and railroad negligence cases. A significant case in which I was involved resulted from a train explosion in Waverly, Tennessee, in 1978. This accident led to the federal requirements for head shields, shelf couplers, and thermal insulation on certain tank cars. Further, I participated as either a member of the litigation committee or consultant to the attorneys handling the lawsuits arising out of three of the worst railroad catastrophes in recent years--Dunsmuir, California (July 15, 1991), Duluth, Minnesota/Superior, Wisconsin (June 30, 1992) and Richmond, California (July 26, 1993), each of which resulted in many personal injuries and serious environmental damages.

The purpose of my testimony is to urge Congress to revise the FRSA to allow victims of railroad derailments to have the ability to bring state tort law claims to afford them the justice required by common sense and sound policy. The FRSA, as currently written, contains an express preemption provision which requires federal court judges to find that the FRSA preempts state law in many railroad tort cases. Numerous courts have recognized a common law claim for violation of Federal Railroad Administration ("FRA") requirements. However, some federal

court judges feel their hands are tied and that they must find preemption in accordance with the FRSA's language. It is this problem that I am here to discuss today and to advocate for a revision of the FRSA to ensure that judges in similar cases will not be forced to find preemption of common law tort actions. First, I will explain how federal case law illustrates the problems associated with the FRSA's preemption provisions. Second, I will address state case law that has found that preemption does not exist. Third, I will address some additional concerns related to federal railroad safety oversight which further emphasize the need to change the current railroad safety laws.

Federal Case Law Illustrates Problems Associated With FRSA's Preemption Provisions

A recent federal court case regarding claims for personal injuries and property damage suffered because of a train derailment illustrates the gravity of this problem. In *Mehl v. Canadian Pacific Railway, Ltd.*, Case No. 4:02-cv-009, Order Granting Defendants' Motion to Dismiss (D.N.D. Mar. 6, 2006) ("*Mehl*"), a class of plaintiffs filed suit against Canadian Pacific Railway ("CP Rail") for damages suffered as a result of a derailment of a CP Rail freight train near Minot, North Dakota. In response to the Plaintiffs' complaint alleging seven different claims, CP Rail sought to dismiss the case, claiming that the Eighth Circuit Court of Appeals' federal precedent mandates that the court find the Plaintiffs' claims are preempted by federal railroad safety laws. *Mehl* at 3.

The North Dakota federal district court engaged in an analysis of the FRSA and federal preemption doctrine and, yet, regretfully, found that federal law required it to dismiss the Plaintiffs' complaint. The court explained that Congress adopted the FRSA to achieve national uniformity among railroad standards and included an express preemption provision in the Act which clearly states that a State may adopt a law, regulation, or order regarding railroad safety only until the federal government "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* at 4 (quoting 49 U.S.C. § 20106 (2005)).

Relying upon Supreme Court precedent, the *Mehl* court explained that the FRSA's preemption provision "dictates that, to pre-empt state law, the federal regulation must 'cover' the same subject matter, and not merely 'touch upon' or 'relate to that subject matter.'" *Mehl* at 4-5 (quoting *Norfolk So. Ry. Co. v. Shanklin*, 529 U.S. 344, 351 (2000)). The court also noted that the Supreme Court and other federal circuit courts have held that several provisions of the FRSA preempt state law. *Id.* at 5. *See, e.g., Norfolk So. Ry. Co. v. Shanklin*, 529 U.S. at 347 (holding that federal regulations covered the subject matter of the adequacy of the warning devices installed with the participation of federal funds); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993) (holding that federal regulations covered the subject matter of claims of excessive speed); *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (holding, in the context of a motion for preliminary injunction, that the FRSA preempted the District of Columbia's hazard materials transport law).

Interestingly, the *Mehl* court also took care to note the numerous state court decisions that have found that state law tort claims were not preempted by the FRSA. *Mehl* at 6. *See, e.g., Clark v. Illinois Central R.R. Co.*, 794 So.2d 191, 196 (Miss. 2001) (holding an obstructed view

claim was not preempted by the FRSA's regulations regarding warning devices at railroad crossings); *In re Miamisburg Train Derailment Litig.*, 626 N.W.2d 85 (Ohio 1994) (holding the FRSA did not preempt a claim for negligent operation (failure to use reinforcing brake pads) because the regulation was adopted after the manufacture of the railroad car in question). Moreover, the *Mehl* court noted that the Eighth Circuit has ruled that neither a failure to warn claim nor a negligence claim based on the reflectivity of crossing warning signs was preempted by the FRSA. *Id.* at 7. *See St. Louis Sw. Ry. Co. v. Malone Freight Lines, Inc.*, 39 F.3d 472 (8th Cir. 1996); *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472 (8th Cir. 1996).

However, the *Mehl* court ultimately relies upon *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005) ("*Scottsbluff*") to find preemption. In *Scottsbluff*, the Eighth Circuit looked at the "extent to which the adopted by the FRSA address freight car inspections." *Mehl* at 8 (quoting *Scottsbluff*, 416 F.3d at 793). The court determined that it was "clear that the FRA's regulations are intended to prevent negligent inspection" and "there is no indication that the FRA meant to leave open a tort cause of action to deter negligent inspection." *Id.* at 9 (quoting *Scottsbluff*, 416 F.3d at 794). The court, consequently, held that negligent inspection claims are preempted by the FRSA's regulations.

Nevertheless, what is most striking is the Court's clear dissatisfaction with the current state of federal law and the outcome that it forced upon the victims of the Minot derailment. The court stated: "*While the Court is convinced the dismissal of Plaintiff's claims is inevitable under the current state of federal law in the Eighth Circuit, this Court recognizes that such a result is unduly harsh and leaves the Plaintiffs with essentially no remedy for this tragic accident.*" *Id.* at 25 (emphasis added). The *Mehl court* attempted to explain its dilemma as follows, which is instructive and worth reiterating for the Congressional subcommittee:

> While federal preemption often means that there is no remedy to a claimant, in many instances unfortunately this result is necessary to vindicate the intent of Congress. By pervasively legislating the field of railroad safety, Congress demonstrated its intent to create uniform national standards and to preempt state regulation of railroads. If state common law tort claims were permitted to proceed despite this Congressional intent, on the ground that the purported tortfeasor had in some way allegedly failed to comply with the federal standards, then manufacturers would inevitably be subjected to varying interpretations of the federal regulations in the different states. Inevitably, these tort actions would generate precisely those inconsistencies in railroad safety standards that Congressional action was intended to avoid.

Id. at 25-26 (quoting *Oulette v. Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (internal citation omitted)).

The court also expressed the concern that we are raising today to this Congressional subcommittee: The FRSA "fails to provide any method to make the injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system

is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies." *Id.* at 26. As the *Mehl* court noted, "it is the province of Congress, not the judicial branch, to address this inequity." *Id.* I hope that Congress will heed this statement duty and address this fundamental unfairness by amending the FRSA.

The *Mehl* court clearly relied upon the FRSA's attempts at achieving national uniformity, emphasizing: "It is clear that Congress determined that there was a need for national uniformity and a need to adopt standard federal regulations to protect the public rather than allow for varied and inconsistent state law remedies." *Id. However, the Supreme Court has determined that the importance of fostering uniformity among regulations does not warrant the wholesale elimination of an individual's common law right to remedies for tort violations.* In *Sprietsma v. Mercury Marine*, 537 U.S. 51, 54 (2002), the Court analyzed whether a state common law tort action is preempted by the Federal Boat Safety Act of 1971 ("FSBA"). The FSBA is akin to the FRSA because it contains very similar language with regard to restrictions on state laws, except the FSBA deals with manufacturing and the FRSA addresses railroad safety.

In support of its argument that the FBSA preempts the Petitioner's claims, the Respondent, Mercury Marine, relied upon one of the FSBA's main goals: fostering uniformity in manufacturing relations. *Id.* at 70. The Supreme Court responded that while uniformity is important to the industry, "this interest is not unyielding." *Id.* The Court states that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety." *Id.* The same principle should apply to the FRSA, as emphasized by *its* title.

State Case Law Reiterates Presumption Against Preemption

It is helpful to contrast the *Mehl* court's decision with a recent Minnesota state court decision that was able to employ common sense and fundamental fairness to allow Plaintiffs to obtain a remedy in another case involving the Minot derailment. *See In re the Soo Line R.R. Co. Derailment of January 18, 2002 in Minot, ND*, Court File No. MC 04-007726, Supplement to Order on Motion to Dismiss on the Issue of Federal Preemption (Minn. Apr. 24, 2006) ("*Soo*"). In this case, the court also engaged in an extensive review of the federal preemption doctrine. However, this court focused on an established judicial principle that was curiously left out of the *Mehl* court decision – the "presumption against preemption." *Soo* at 10-11. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 668 (1993). In particular, the Supreme Court has said that the States' historic power to regulate train safety must not be "superceded … unless that [is] the clear and manifest purpose of Congress." *Soo* at 10 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted). The *Soo* court summarizes the federal preemption cases as "reluctant" to apply preemption "in recognition of the harsh results that can occur when legitimate claims are dismissed. *Id.*

In addition to federal and state court cases which emphasize the need to respect the states' authority and notions of individual fairness, this court relied upon three key principles to determine that Plaintiffs' claims would not be preempted by the FRSA:

- "The adequacy of problems and the local nature of the hazard itself result in an essentially local safety concern which is not even of a statewide character, much less capable of being adequately encompassed within national uniform standards." *Id.* at 29.
- "Enforcement of Defendants' own rules against them is not incompatible with federal laws, regulations, or orders." *Id.* at 32.
- "These Plaintiffs' claims are not preempted because they are necessary to eliminate or reduce an essentially local safety hazard. Allowing such claims to go forth would not be incompatible with a law, regulation or order of the U.S. Government. Nor would it unreasonably burden interstate commerce." *Id.* at 34.

Resolving Challenges to Federal Government Oversight

The FRA's rail safety audit indicates that there has been an 11 percent increase in railroad grade crossing fatalities between 2003 and 2004. *Audit of Oversight of Highway-Rail Grade Crossing Accident Reporting, Investigations, and Safety Regulations*, Federal Railroad Administration, Report No.: MH-2006-016, at 2 (issued Nov. 28, 2005). Not only is it important to reduce the number of fatalities but it is also vital for victims to have a means for achieving appropriate compensation in the event of a railroad accident. The audit also clearly recognized that the possibility of collisions at grade crossings poses an increasing threat to the traveling public and presents many challenges for federal government oversight. *Id.* at 4.

The federal government cannot, and should not, be the sole body in charge of railroad safety. Likewise, federal courts cannot be the sole arbiter of rail safety cases. Public transportation authorities appear to be already overwhelmed by its responsibilities. In 2004, there were 243,016 grade crossings, of which 149,628 or 62 percent were maintained by public transportation authorities. *Id.* at 3. Yet, the federal government has been deficient in encouraging compliance with reporting requirements, investigating crossing collisions, and issuing violations for critical safety defects.

According to the FRA, railroads failed to report 21 percent of reportable grade crossing collisions to the National Response Center (NRC). *Id.* The FRA's analysis showed that 115 collisions, which resulted in 116 fatalities, were reported to the FRA within 30 to 60 days after the collision, as required, but that was too late to allow Federal authorities to promptly decide whether to conduct an investigation. *Id.* at 6-7.

Even more disturbing is the fact that the FRA investigated only 9 of the 3,045 grade crossing collisions that occurred in 2004, and from 2000 to 2004, the FRA investigated only 13 percent of the most serious crossing collisions that the railroads reported. *Id.* at 7. Further, while the FRA may have been inspecting grade crossing warning signals for safety defects, the FRA recommended far too few violations for the many critical safety defects it identified. *Id.* at 8. From 2000 to 2004, the FRA recommended only 347 critical safety defects, or about 5 percent, of all defects to carry a monetary fine. *Id.* Clearly, the flawed railroad safety system needs to be fixed to ensure that railroads are held accountable for critical safety issues. One important step towards doing this would be to amend the FRSA to no longer allow for preemption of state law in cases involving railroad accidents.

Conclusion

Many federal judges find that federal law preempts state common law tort actions involving railroad accidents. Yet, state law courts are not hampered by the FRSA and are able to allow victims to seek justice by focusing on the preemption against presumption and other applicable precedent. It is inconceivable that Congress would enact a law that would be inherently unfair to innocent persons and property owners injured by the negligent actions of railroads who seek justice in federal courts. I submit that Congress did not do so in the FRSA.